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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

Nos. 71 and 73

FEDERAL POWER COMMISSION,
Petitioner,
vs.
SOUTHERN CALIFORNIA EDISON COMPANY, and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.
No. 71

CITY OF COLTON, CALIFORNIA,
Petitioner,
vs.
SOUTHERN CALIFORNIA EDISON COMPANY, and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondents.
No. 73

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner Public Utilities Commission of the State of California prays that this Court grant rehearing

of its opinion dated March 2, 1964 in the above-entitled matters for the following reasons:

1. The Court erred in finding that there was substantial evidence to support the finding of the Federal Power Commission that there was out-of-state energy sold by Southern California Edison Company to the City of Colton for resale. (Footnote 5, pp. 3 and 4.)

2. The Court erred in finding that there "are facilities owned by Edison which it uses exclusively to effect the wholesale to Colton and not for local distribution." (Footnote 6, p. 5.)

3. The Court erred in relying upon citations of dicta in factually dissimilar cases to support its conclusion that the Federal Power Act confers upon the Federal Power Commission jurisdiction over all sales at wholesale in interstate commerce.

4. The Court erred in holding that the Federal Power Act repealed the Boulder Canyon Project Acts by implication.

REASONS FOR GRANTING REHEARING

1. There is no substantial proof that any out-of-state energy was sold by Edison to Colton for resale. The "proofs" are not "in sharp conflict." The Federal Power Commission received no "scientific evidence" on the subject from its own experts or from Colton. While quoting from *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 529, that "federal jurisdiction was to follow the flow of electric energy, *an engineering and scientific, rather than a legalistic*

or governmental test" the Court ignores the fact that the only scientific evidence in the record was offered by Edison, and is contrary to the FPC decision. The engineering evidence offered by FPC's engineer and only witness consisted of tracing energy from Hoover Dam, which is outside of the State of California, through Hayfield in California to Edison's Highgrove Substation.

Edison's own meters showed delivery of Hoover-Hayfield energy to *Highgrove* (not to Colton) on the hour and half hour 596 times in the last six months of 1954; 1,338 times in 1955; 270 times in 1956; 199 times in 1957 and 1,115 times in 1958, and these are admitted facts. But FPC's engineering witness purported to trace some of that energy, unmetered from Highgrove on, into the sale to Colton by the simple expedient of saying *without any attempt at proof:*

> "There all or part of the energy was transmitted . . . to the 66 kv bus at Highgrove substation. . . . Some of this energy was transmitted . . . to the Colton substation . . . to the 11 kv bus and thence . . . to the City of Colton substation where [Edison] stepped down the voltage to 4 kv. . . ." (R. 47.)

The witness ignored all of the California sources of supply to the Highgrove 220 and 66 kv buses, and California customers' demands on the 220, 66 and 11 kv buses (see diagram following page 12, Brief of Public Utilities Commission). He ignored the fact that all of Colton's needs could have been satisfied from California sources also connected with High-

grove, and the fact that all of the Hoover energy could have been delivered to Edison's other customers.

The conclusion he reached, while nothing but idle speculation, forms the basis for FPC's finding which is repeated by the Court with evident approval in footnote 5, pp. 3, 4, that:

> "On the basis of the record, electric energy generated at Hoover was sold to Colton during 596 hours . . . in the last six months of 1956, etc."

In *N.L.R.B. v. Columbian E. & S. Co.*, 306 U.S. 292, 299, this Court defined "substantial evidence" as that "affording a substantial basis of fact from which the issue can be reasonably inferred. [Citing cases.] Substantial evidence is more than a mere scintilla, and *must do more than create a suspicion* of the existence of the fact to be established." (Emphasis supplied.)

In the case at bar, the Court has erred in departing from that definition and in creating a new standard from which it appears that if FPC says, "It is so" no matter how baseless the finding, the requirement of substantial evidence is satisfied and the process of judicial review is terminated.

2. The Court's decision has rendered meaningless the exemption of local distribution facilities from FPC jurisdiction (Sec. 201(b) Federal Power Act.) There is nothing so well established as the fact, without any contradiction in the record, that the City of Colton is served solely from local distribution facilities which also serve other customers. FPC's erroneous finding is perpetuated by this Court in footnote 6,

p. 5, not only in its misstatement of the facts, but in direct conflict with this Court's own definition that facilities provide local distribution "only after the current [is] subdivided for individual consumers." (*U.S. v. Public Utilities Commission*, 345 U.S. 295, 316.) The "current" on the 12 kv distribution lines which serve Colton is "subdivided" to serve thousands of domestic and industrial customers as well as the customers mentioned in the footnote; thereafter, according to this Court's own definition, they are local distribution facilities. Further, there are no facilities used to serve Colton exclusively; the Globe mills and Derby lines mentioned in the footnote constitute one loop circuit; there is no "last customer" on a loop. If the facilities which serve Colton are not local distribution facilities, then there is no such thing.

The Court's reliance upon FPC's "specialized experience ..., in determining such questions," is obviously misplaced, in view of the facts. While the Court may rely upon the expertise of an administrative agency as against inexpert litigants, the Public Utilities Commission of the State of California has unquestioned expertise in the regulation of electric utilities, acquired over many more years of experience than that of the comparatively recent Federal Power Commission, and the California Commission has not misrepresented and will not misrepresent facts to this Court in order to enlarge its jurisdiction, or for any reason.

3. FPC by its opinion in the cases below has wantonly disregarded the promises and reassurances it

made to the States at the time of passage of the Federal Power Act that none of their powers which could constitutionally be exercised prior to the Act would be taken away. The Court has sustained FPC in this shocking breach of faith, in a legal and factual situation which had no precedent in this Court's decisions, and has erroneously relied upon citations of dicta in factually dissimilar cases to support its decision that the Federal Power Act conferred upon FPC jurisdiction over all sales at wholesale in interstate commerce.

4. The Congressional intent not to repeal the Boulder Canyon Project Acts, despite the existence of the previously enacted Federal Power Act, was clearly manifested by amendment of the acts in 1940 (54 Stat. 774) and 1954 (68 Stat. 43) when it not only left intact that portion authorizing regulation of rates charged by purchasers of Hoover energy, but affirmatively expanded the authority of the Secretary of the Interior.

Although repeals by implication are never favored, and although the Congressional intent to keep all aspects of the Hoover project out of the jurisdiction of FPC has been clearly and continuously manifested, the Court erroneously found a repeal by implication.

CONCLUSION

For any or all of the foregoing reasons, the Public Utilities Commission of the State of California submits that rehearing should be granted.

Dated, San Francisco, California,
March 23, 1964.

RICHARD E. TUTTLE,
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Certificate of Service

I hereby certify that the foregoing Petition for Rehearing was on March 23rd, 1964 deposited in the United States Post Office, with air mail postage fully prepaid, addressed to the following:

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Dated, March 23, 1964.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 33 of this Court.

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